Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

No. 95-86

In the Supreme Court of the United States

OCTOBER TERM, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
MARTA W. BERKLEY
Attorneys
Federal Deposit Insurance Corporation
Washington, D.C. 20429

24 pp

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC), which is responsible for agency policies regarding assessment and payment of insurance premiums into the federal deposit insurance funds, has such a direct pecuniary interest in the maintenance of those funds that it may not serve as a decision-maker in the assessment process.

2. Whether, in the absence of any disputed issue of material fact, petitioner was nonetheless entitled to a *de novo* evidentiary hearing before the agency or the district court on whether its nonpayment of deposit insurance premiums should result in the termination of its insured status.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Callejo v. *RTC*, 17 F.3d 1497 (D.C. Cir. 1994)	17
Citizens for Allegan County, Inc. v. *FPC*, 414 F.2d 1125 (D.C. Cir. 1969)	15-16
Coit Independence Joint Venture v. *FSLIC*, 489 U.S. 561 (1989)	17, 18
Concrete Pipe & Products of California, Inc. v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264 (1993)	8, 9, 10, 11
Dugan v. *Ohio*, 277 U.S. 61 (1928)	10, 12
Gibson v. *Berryhill*, 411 U.S. 564 (1973)	8, 10
Hammond v. *Baldwin*, 866 F.2d 172 (6th Cir. 1989)	14
Marathon Oil Co. v. *EPA*, 564 F.2d 1253 (9th Cir. 1977)	16
Marshall v. *Jerrico, Inc.*, 446 U.S. 238 (1980)	8, 10, 11, 12
Pineapple Growers Ass'n v. *FDA*, 673 F.2d 1083 (9th Cir. 1982)	16
Republic Indus., Inc. v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984)	11-12
Schweiker v. *McClure*, 456 U.S. 188 (1982)	14
Tumey v. *Ohio*, 273 U.S. 510 (1927)	8, 9
United Church of the Medical Center v. *Medical Center Commission*, 689 F.2d 693 (7th Cir. 1982)	12, 13

Cases—Continued: Page

United States v. *First City National Bank of Houston*, 386 U.S. 361 (1967) 17, 18
United States v. *Gaubert*, 499 U.S. 315 (1991) 14
Veg-Mix, Inc. v. *United States Dep't of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987) 15
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 10, 12, 13
Withrow v. *Larkin*, 421 U.S. 35 (1975) 14

Constitution, statutes, regulations and rule:

U.S. Const.:
Amend. V 7
Due Process Clause 17
Administrative Procedure Act:
5 U.S.C. 556 ..... 15, 16
5 U.S.C. 704 3
Bank Merger Act, 12 U.S.C. 1828 18
Clayton Act, 15 U.S.C. 12 *et seq.* 18
Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* 2
12 U.S.C. 1813(b)(2) 2
12 U.S.C. 1813(c)(2) 2
12 U.S.C. 1817(b)(1)(A) 9
12 U.S.C. 1817(b)(1)(C)(i) 2
12 U.S.C. 1817(b)(1)(C)(i)(III) 2, 9
12 U.S.C. 1817(b)(1)(C)(iii) 2
12 U.S.C. 1817(b)(2)(A)(i)(I) 11
12 U.S.C. 1817(b)(2)(A)(iv) 11
12 U.S.C. 1817(g) 6, 8
12 U.S.C. 1817(h) 8, 17
12 U.S.C. 1818(a)(2)(A)(iii) 3, 11
12 U.S.C. 1818(a)(2)(B) 4
12 U.S.C. 1818(a)(3) 4, 7
12 U.S.C. 1821(a)(4)(A) 12
12 U.S.C. 1821(a)(6) 2
12 U.S.C. 1821(f) 17
12 U.S.C. 1462-1464 2
12 U.S.C. 1464 2

Regulations and rule—Continued:	Page
12 C.F.R.:	
Section 308.5 (1995)	4
Section 308.5(b)(8) (1995)	4
Section 308.29(a) (1995)	4
Section 308.40 (1995)	4
Section 308.119(a) (1995)	4
Section 327.3 (1994)	3
Section 327.3(e)(1)(ii) (1994)	3
Section 327.4 (1995)	2
Section 327.4(a) (1995)	3
Section 327.4(a)(2) (1995)	3
Section 327.4(d) (1995)	3
Fed. R. Civ. P. 56	15, 17
Miscellaneous:	
BNA Banking Daily, Sept. 6, 1995, at 6	11
59 Fed. Reg. (1994):	
p. 67,153	3
pp. 67,161-67,163	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-86

DOOLIN SECURITY SAVINGS BANK, F.S.B., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 53 F.3d 1395. The decision and order of the FDIC's Board of Directors terminating petitioner's insured status (Pet. App. 31a-46a), and the recommended order of the administrative law judge (Pet. App. 47a-58a), are reported at FDIC Enforcement Decisions and Orders ¶ 5215, at A-2453.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1995. A petition for rehearing was denied on June 13, 1995. Pet. App. 30a. The petition for a writ of

certiorari was filed on July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a federally insured savings association, with its principal place of business in New Martinsville, West Virginia. As a "federal savings association," within the meaning of 12 U.S.C. 1464 and 1813(b)(2), and an "insured depository institution," within the meaning of 12 U.S.C. 1813(c)(2), petitioner has two federal regulators. The Office of Thrift Supervision (OTS) has primary regulatory and supervisory authority (see 12 U.S.C. 1462-1464), and the Federal Deposit Insurance Corporation (FDIC) administers the system of federal deposit insurance under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, including the Savings Association Insurance Fund (SAIF) (see 12 U.S.C. 1821(a)(6)).

The FDIC is mandated by statute to establish a risk-based premium system for deposit insurance, such that the amount of the premiums that a depository institution pays to the SAIF must reflect the "probability that the deposit insurance fund will incur a loss with respect to the [depository] institution." 12 U.S.C. 1817(b)(1)(C)(i). Congress required the FDIC, in assessing an institution's deposit insurance premiums, to consider, among other things, the institution's assets, its liabilities, "any other factors the [FDIC] determines are relevant to assessing [the] probability" that the institution will incur a loss (12 U.S.C. 1817(b)(1)(C)(i)(III)), and "the revenue needs of the deposit insurance fund" (12 U.S.C. 1817(b)(1)(C)(iii)). Pursuant to that mandate, the FDIC has issued regulations governing the assessment of insurance premiums, 12 C.F.R. 327.4 (1995), which provide that

each depository institution will be assigned an "assessment risk classification," 12 C.F.R. 327.4(a) (1995). The regulations also provide that, in establishing an institution's risk classification, the FDIC will consider, among other things, "supervisory evaluations provided by the institution's primary federal regulator." 12 C.F.R. 327.4(a)(2) (1995).[1]

A depository institution that is dissatisfied with its risk classification may file a written request for review of the classification by the Director of the FDIC's Division of Supervision. 12 C.F.R. 327.4(d) (1995). After the review is completed, the Director must promptly notify the institution in writing of the FDIC's determination whether reclassification is warranted. *Ibid.* Judicial review of the FDIC's final decision is available under the Administrative Procedure Act (APA), 5 U.S.C. 704. See Pet. App. 36a.

A depository institution that fails to pay its insurance premiums in a timely fashion may have its insured status terminated by the FDIC. 12 U.S.C. 1818(a)(2)(A)(iii) (permitting termination for violation of "any * * * condition imposed in writing by the [FDIC] in connection with the approval of any application * * * by the insured depository institution"). If the FDIC determines that termination of insurance is warranted, it must notify the institu-

---

[1] When this case was before the court of appeals, the FDIC's risk assessment regulation was 12 C.F.R. 327.3 (1994), and the provision taking supervisory evaluations into account was 12 C.F.R. 327.3(e)(1)(ii) (1994). See Pet. App. 2a n.1, 3a n.3. The FDIC subsequently redesignated and revised the regulation, effective April 1, 1995, with no changes material to this case. See 59 Fed. Reg. 67,153, 67,161-67,163 (1994); Pet. App. 2a n.1.

tion of that determination in writing, 12 U.S.C. 1818(a)(2)(B), and provide the institution with the opportunity to contest the determination in a hearing on the record, 12 U.S.C. 1818(a)(3).

Under FDIC regulations, an initial hearing on the record is held before an administrative law judge (ALJ). 12 C.F.R. 308.5, 308.119(a) (1995). The ALJ is charged with recommending a decision, 12 C.F.R. 308.5(b)(8) (1995), and may grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law, 12 C.F.R. 308.29(a) (1995). The FDIC's Board of Directors makes the final decision whether an institution's insured status should be terminated. 12 U.S.C. 1818(a)(3); 12 C.F.R. 308.40 (1995).

2. a. On December 1, 1992, the FDIC notified petitioner that it had been assigned an assessment risk classification of "1B" (the second most favorable classification) for the purpose of determining its deposit insurance rate for the six-month period beginning January 1, 1993. The semi-annual insurance assessment on petitioner called for by the notification was $40,651.53, due on January 31, 1993. Pet. App. 2a. The FDIC's classification of petitioner was based, in part, on a rating assigned to petitioner by a 1992 OTS examination report. *Id.* at 32a-33a.

Petitioner contended that the OTS examination report was erroneous, and that its risk classification should have been "1A" (the most favorable rating). Pet. App. 2a-3a. A classification of 1A would have resulted in a semi-annual deposit insurance premium of $32,677.37. In January, 1993, petitioner paid the FDIC $32,677.37, instead of the full $40,651.53 called for by the FDIC's notice. On two occasions, the FDIC noti-

fied petitioner that it had failed to pay its full semi-annual assessment. *Id.* at 3a.

Petitioner requested and obtained administrative review of its risk classification. The FDIC's Director of the Division of Supervision denied petitioner's request for reclassification, and, on July 7, 1993, the FDIC's Supervision Review Committee also denied petitioner's request. Petitioner did not seek judicial review of the FDIC's risk classification determination. Pet. App. 13a. When petitioner's next semi-annual insurance premium became due on July 31, 1993, petitioner again paid the FDIC an amount appropriate for a 1A, rather than a 1B, classification. *Id.* at 3a. The FDIC subsequently commenced administrative proceedings to terminate petitioner's insured status. *Ibid.*

The FDIC moved for summary disposition before the ALJ in the termination proceeding, arguing that there were no disputed issues of material fact. The ALJ agreed and granted summary disposition in a recommended order suggesting that petitioner's insured status be terminated. Pet. App. 47a-58a. The ALJ noted that petitioner had conceded that it had not paid the full amount of the deposit insurance premium that was due (*id.* at 49a-50a), and it concluded that petitioner could not challenge the classification rating assigned to it in the termination proceeding, for such a challenge could be brought only through a separate avenue of review, which petitioner had already invoked (*id.* at 51a). The ALJ also rejected petitioner's argument that the FDIC's alleged financial interest in the outcome disqualified the FDIC from determining the amount of the insurance premium. *Id.* at 54a.

b. The FDIC's Board of Directors agreed with the ALJ that petitioner's insured status should be terminated for nonpayment of the full premium. Pet. App. 31a-46a. The Board observed that the only issues before it were "whether [petitioner] has paid its insurance premium in accordance with law and regulation, and, if it has not, the FDIC's authority to terminate its deposit insurance." *Id.* at 35a. The Board rejected petitioner's attempt to contest the correctness of its insurance premium in that proceeding. *Id.* at 36a.

The Board also rejected petitioner's contention that the FDIC was required, by 12 U.S.C. 1817(g), to bring an action in district court to recover unpaid insurance assessments, rather than terminating petitioner's insured status for nonpayment by administrative action. Pet. App. 37a-38a. The Board concluded that, although the FDIC has authority to sue a depository institution in district court for nonpayment, it is under no legal obligation to do so. It held that "[t]he remedy of section 1817(g) is not exclusive and does not limit in any way the FDIC's ability to select an alternative method of redress[.] * * * Indeed, the language of section 1817(h) is clear on its face that the remedies of section 1817(g) are *in addition to* any other remedy against an insured depository institution available to the FDIC." *Id.* at 38a.

Finally, the Board rejected petitioner's argument that the termination was unlawful because it had had no opportunity to contest the amount of its premium in a full evidentiary hearing. The Board observed that "[n]o such hearing is required by statute or regulation." Pet. App. 40a. The Board also noted

that, as to the FDIC's termination of petitioner's insured status, petitioner "has been actively participating in such a formal APA hearing." *Ibid.*

3. The court of appeals affirmed the FDIC's termination of petitioner's insured status. Pet. App. 1a-29a. The court rejected petitioner's argument that the termination was illegal because the matter was decided on summary disposition, without an evidentiary hearing. The court pointed out that the FDIC had conducted a formal APA adjudication, as required by 12 U.S.C. 1818(a)(3), and that the matter had been decided on summary disposition because no material facts concerning the premium assessment were at issue. Pet. App. 11a. The court noted that "the procedure at issue specifically involved [petitioner's] termination of insurance and not the determination of its risk classification," which is not subject to formal adjudication under the APA. *Id.* at 11a n.9.

The court further rejected petitioner's contention that the FDIC's financial interest in the premium assessment violated petitioner's Fifth Amendment right to an impartial decision-maker. Pet. App. 21a-25a. The court reasoned that "finding the FDIC biased in this case would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies." *Id.* at 24a. The court observed that the FDIC's authority to set deposit insurance premiums is circumscribed by statute, and that the FDIC's interest in maintaining the solvency of the SAIF "appears no greater than the interests of many agencies that adjudicate penalty or fee determinations in their own administrative proceedings." *Id.* at 25a.

Finally, the court rejected petitioner's contention that 12 U.S.C. 1817(g) deprives the FDIC of authority to invoke administrative procedures to terminate a depository institution's insured status. Pet. App. 25a-28a. The court observed that "[a]n administrative agency is entitled to considerable deference in selecting the remedies to enforce the policy of a statute it administers." *Id.* at 26a. Reading Section 1817(g) in conjunction with Section 1817(h), the court concluded that the remedy of suit "is not exclusive," but is "in addition to" any other remedy available to the FDIC, including the remedy of termination of insured status. *Id.* at 26a-27a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the FDIC has such a direct pecuniary interest in the insurance premiums paid to the federal deposit insurance funds that it cannot serve as a decision-maker in the process of assessing those premiums. That contention is incorrect.

a. This court has stated on several occasions that "those with substantial pecuniary interest in legal proceedings should not adjudicate th[o]se disputes." *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); see *Tumey* v. *Ohio*, 273 U.S. 510 (1927). That principle applies to administrative officials. *Gibson*, 411 U.S. at 579. But the principle enunciated in *Gibson* and *Tumey* applies only to *adjudication* by such officials; it does not operate to disqualify officials acting in a prosecutorial or legislative capacity. See *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2277 (1993); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250 (1980). For that reason, the principle

invoked by petitioner does not disqualify the FDIC from setting the deposit insurance premiums payable by federally insured depository institutions. In setting those premiums, FDIC officials are not performing "judicial or quasi-judicial functions" (*Concrete Pipe*, 113 S. Ct. at 2277), as this Court has developed those concepts. Rather, FDIC officials are exercising regulatory authority consistent with guidelines established by Congress—first, by exercising a quasi-legislative function in establishing criteria for risk classification determinations, and, second, by performing a technical task in applying those criteria to particular depository institutions.

Congress directed that the FDIC's Board of Directors "shall, by regulation, establish a risk-based assessment system for insured depository institutions." 12 U.S.C. 1817(b)(1)(A). Congress also required the FDIC to take into account "the revenue needs of the deposit insurance fund" in establishing the system "for calculating a depository institution's semiannual assessment." 12 U.S.C. 1817(b)(1)(C)(i)(III). The regulatory structure established by Congress thus indicates that FDIC regulators exercise quasi-legislative, rather than quasi-judicial, authority when they establish risk classification criteria governing depository institutions' insurance premiums.

In determining the proper risk classification for a particular depository institution, FDIC regulators must apply their regulations to a set of facts. That action, however, is quite different from the decision-making at issue in *Tumey* and its progeny. *Tumey* itself involved a criminal prosecution before the "mayor's court" of an Ohio town (273 U.S. at 515), as

did *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* involved charges of professional misconduct against optometrists tried before a Board of Optometry (411 U.S. at 567). Each case involved an adversary proceeding in which the adjudicator "hear[d] * * * witnesses and rule[d] on * * * disputed factual or legal questions." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 247. The same is not true of the system of setting deposit insurance premiums, which involves the application of technical regulations to each bank in light of the assets and liabilities of the bank, and which, like the actuarial determinations challenged unsuccessfully in *Concrete Pipe*, is not "vulnerable to suggestions of bias or its appearance." 113 S. Ct. at 2284.

b. The principles of *Tumey* are also not applicable here because only a challenge to the FDIC's termination decision was before the court of appeals, and any connection between the FDIC's termination of petitioner's deposit insurance and a financial benefit to the deposit insurance fund is "exceptionally remote." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 250; see also *Dugan* v. *Ohio*, 277 U.S. 61, 65 (1928); *Concrete Pipe*, 113 S. Ct. at 2284-2885. The amount of the deposit insurance imposed on petitioner was not at issue in the proceedings below; that amount was established in a separate, regulatory proceeding, which became final after petitioner failed to seek judicial review of the assessment under the APA. The amount of the assessment had no connection to the conclusions of the ALJ and the FDIC Board that petitioner's deposit insurance should be terminated; that conclusion was based solely on the fact, admitted by petitioner, that petitioner had failed to pay the

full amount of its premiums. Once the FDIC invoked the statutory provision for termination of deposit insurance for nonpayment of premiums (12 U.S.C. 1818(a)(2)(A)(iii)),[2] the adjudicators concluded, under a straightforward application of the statute, that petitioner's insured status should be terminated.

c. In addition, the FDIC's discretion in setting the insurance premiums is significantly circumscribed by statute, as the court of appeals recognized (Pet. App. 24a-25a). Congress directed the FDIC to set the assessments for insured institutions to maintain the reserve ratio for the fund at a specific figure, 12 U.S.C. 1817(b)(2)(A)(i)(I), which Congress designated to be either 1.25% of the total estimated insured deposits, or a "higher percentage," if the FDIC determines that circumstances "rais[e] a significant risk of substantial future losses to the fund," 12 U.S.C. 1817(b)(2)(A)(iv). The FDIC cannot, therefore, arbitrarily impose high insurance premiums on the banking industry to bolster the insurance fund.[3] Because of the statutory limits on the FDIC's discretion, there is no "significant opportunity for bias to operate." *Concrete Pipe*, 113 S. Ct. at 2285; see *Republic Indus., Inc.* v. *Teamsters Joint Council*

---

[2] The decision to commence proceedings for termination of insured status is clearly not subject to the disqualification principles of *Tumey*, for that process is "prosecutorial or plaintiff-like," not adjudicative. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 248.

[3] Indeed, the FDIC recently announced that it is refunding to the banking industry approximately $1.5 billion, plus interest, in collected insurance premiums, as the funds in the bank insurance fund now exceed the 1.25% ratio. BNA Banking Daily, Sept. 6, 1995, at 6.

No. 83 of Virginia Pension Fund, 718 F.2d 628, 640-641 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984).

d. Petitioner has made no showing that the desire to ensure financing of the insurance fund could distort the judgment of any FDIC official resolving insurance disputes. No government official stands to profit personally from the outcome of the insurance proceedings. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 250; *Dugan*, 277 U.S. at 65 (pointing out that the official in that case "receives a salary in any event, whether he convicts or acquits"). Furthermore, the FDIC's deposit insurance funds are restricted to the purpose of carrying out the deposit insurance program, and may not be commingled with any other funds. 12 U.S.C. 1821(a)(4)(A). Thus, even a decision by an FDIC official to assess an unjustifiably large insurance premium would not benefit the FDIC in the manner that petitioner suggests (Pet. 11), for the FDIC does not have a financial stake in the outcome of the case, beyond that necessary to ensure the fiscal soundness of the insurance funds. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 251.

Thus, petitioner is incorrect in arguing that the decision below conflicts with *Ward* v. *Village of Monroeville*, *supra*, and the decision of the Seventh Circuit in *United Church of the Medical Center* v. *Medical Center Commission*, 689 F.2d 693 (1982). In *Ward*, the Court held that the Mayor of Monroeville, the chief executive officer of the municipality, could not also exercise judicial powers in a "mayor's court," when "the revenue produced from [the] mayor's court provide[d] a substantial portion of [the] municipality's funds," 409 U.S. at 59, and the "mayor's executive responsibilities for village finances may [have made]

him partisan to maintain the high level of contribution from the mayor's court," *id.* at 60. In that case, the fines levied in the mayor's court went into the general municipal treasury. *Id.* at 59 n.1. Here, as discussed at p. 12, *supra*, the connection between the insurance premium assessed by the FDIC and the FDIC's level of funding is far more attenuated, for the funds obtained in the insurance program must be used for insurance purposes only.

Similarly, in *United Church of the Medical Center*, the court of appeals concluded that a local government entity was disqualified from adjudicating a title reverter proceeding, when the outcome of that proceeding could have resulted in the reversion of substantial property to the entity "without cost to [it] even though the property has valuable improvements on it, and in the event of subsequent sale of the property, the proceeds redound[ed] to the coffers of the [governmental unit]." 689 F.2d at 699. The court held that the local government's temptation to enrich its coffers was sufficiently great to disqualify it from ruling on the reverter proceeding. As the court of appeals in this case remarked (Pet. App. 24a), however, the same contention cannot be reasonably made here, given the limits on the FDIC's discretion in setting the level of the fund.

e. The court of appeals observed that "finding the FDIC biased in this case would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies." Pet. App. 24a. The FDIC is charged by Congress with administering the deposit insurance funds and ensuring the soundness of those funds; Congress has also directed that the funds be financed through

deposit insurance premiums. The FDIC is the obvious candidate to establish the amount of those premiums and to take action against a depository institution that refuses to make full payment. The FDIC has an institutional interest in ensuring the success of the regulatory program that Congress has assigned to it, but such an interest is hardly a disqualifying bias, nor does it render the FDIC "incapable of adjudicating disputes * * * given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Id.* at 25a. This Court has recognized that federal bank regulatory agencies have a legitimate interest in ensuring the soundness of the insurance funds covering deposits in federally insured banks and savings associations. See *United States* v. *Gaubert*, 499 U.S. 315, 328, 333 (1991).

This Court has stated that "[w]e must start * * * from the presumption that [government officials] are unbiased," and "[that] presumption can be rebutted [only] by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982); see *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). "[T]he burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker* v. *McClure*, 456 U.S. at 196. But the government "cannot be disqualified from decisionmaking on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or policy." *Hammond* v. *Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989). The FDIC's statutory mission to ensure adequate funding for the deposit insurance funds therefore does not disqualify it from establishing the

level of contributions that insured institutions must make to those funds, or terminating the insured status of those institutions that refuse to do so.

2. Petitioner contends (Pet. 12) that any "party to an administrative agency adjudication has a right to an evidentiary hearing at some point, either a formal hearing before the agency or a trial *de novo* in district court." That contention is incorrect, as is petitioner's related contention that the decision below conflicts with decisions of this Court, the Ninth Circuit, and the District of Columbia Circuit.

a. Petitioner contends (Pet. 14-15) that the FDIC violated the APA's requirements for a hearing on formal adjudication (5 U.S.C. 556) when the ALJ concluded that there were no issues of material fact warranting an evidentiary hearing and recommended a summary disposition in favor of the FDIC on the termination of petitioner's deposit insurance. The APA does not, however, require a pointless evidentiary hearing to be held when there are no material, disputed issues of fact to be resolved—just as the Federal Rules of Civil Procedure do not require a trial to be held in the absence of any disputed issue of material fact. Cf. Fed. R. Civ. P. 56. "Common sense suggests the futility of hearings where there is no factual dispute of substance. * * * [Thus,] an agency may ordinarily dispense with a hearing when no genuine dispute exists." *Veg-Mix, Inc.* v. *United States Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). "The precedents establish * * * that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law." *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125, 1128 (D.C. Cir.

1969). The FDIC was not required to hold an evidentiary hearing on the termination of petitioner's deposit insurance, for it was undisputed as a matter of fact that petitioner had failed to pay the required full amount of deposit insurance. That failure meant that the FDIC was entitled to prevail as a matter of law.

Contrary to petitioner's contention, the decision below does not conflict with *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977). In that case, the court held that the EPA's issuance of effluent permits under the Clean Water Act was a formal adjudication to which the requirements of 5 U.S.C. 556 apply (including the requirement that evidence outside the record not be considered). The court stated that, when agency proceedings are conducted "to adjudicate disputed facts in particular cases," the requirements of formal adjudication generally apply. 564 F.2d at 1262. In this case, however, there were no "disputed facts" to be adjudicated, and therefore a full hearing was not necessary. Indeed, the Ninth Circuit has elsewhere held that, even in cases arising under a governing statute that requires an opportunity for a hearing and a decision on the record in an administrative adjudication, such a hearing is required only when " 'material' issues of fact are raised 'that should not be dispelled at the outset without a hearing.' " *Pineapple Growers Ass'n* v. *FDA*, 673 F.2d 1083, 1086 (9th Cir. 1982).

b. Petitioner also contends that, in the absence of a full evidentiary hearing before the agency, it was entitled to a *de novo* hearing on its contentions in district court. As the court of appeals held (Pet. App. 26a-27a), however, the governing statute gives the FDIC the discretion to choose between proceeding

against petitioner administratively, by terminating its deposit insurance, and proceeding against it in district court, by suing to recover the unpaid insurance premium assessments. See 12 U.S.C. 1817(h) (remedies specifically provided by statute, including right to sue in district court, "shall not be construed as limiting any other remedies against any insured depository institution, but shall be in addition thereto").[4]

The D.C. Circuit's decision in *Callejo* v. *RTC*, 17 F.3d 1497 (1994), is not to the contrary. In that case, the court construed 12 U.S.C. 1821(f) to provide that the Resolution Trust Corporation could make a final administrative decision on the insured status of any bank deposit (subject to the usual principles of judicial review under the APA) or, in the absence of agency regulations providing for such an administrative decision, could require the district court to decide the question of insured status in a *de novo* proceeding. The D.C. Circuit did not suggest that a party to an administrative proceeding has a right to an *evidentiary* hearing in district court whenever an agency decides a matter on summary disposition, and such a ruling would be inconsistent, not only with the APA, but also with Rule 56 of the Federal Rules of Civil Procedure, which authorizes summary judgment to be entered when the moving party is entitled to judgment as a matter of law.

Nor does the decision below conflict with *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), or *United States* v. *First City National Bank*

---

[4] Petitioner has not argued in this Court that a *de novo* hearing in district court is required by the Due Process Clause.

of Houston, 386 U.S. 361 (1967), as petitioner contends. *Coit* held that the statute governing the Federal Savings and Loan Insurance Corporation (FSLIC), the FDIC's predecessor in insuring deposits of federal savings associations, did not give the FSLIC the authority to adjudicate creditors' claims against insolvent savings associations, and that the district courts had original jurisdiction to consider such claims *de novo*. 489 U.S. at 572-579. *Coit* did not involve formal adjudications under the APA, however, and did not address the propriety of summary procedures in such adjudications.

First City National Bank held that, in a district court suit brought by the United States under the Clayton Act and the Bank Merger Act to prevent a merger of banks, the courts were required to consider *de novo* the question whether the public interest would be advanced by the merger, and should not defer to the decision of the Comptroller of the Currency on that question. The Court stressed that, "in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 367. The Court noted that the statutory language at issue did "not express the conventional standard, *i.e.*, whether the agency's action is supported by substantial evidence," that governs judicial review of formal agency adjudications. *Ibid.* Although the Court observed that the Comptroller's action had been "informal," and that no hearing had been held or record "in the customary sense" compiled (*id.* at 368), it did not suggest that a *de novo* judicial hearing

would be required in cases like this one, where the agency's decision is subject by statute to the APA's requirement of formal adjudication, but there are no facts for the agency to adjudicate at an evidentiary hearing. Neither *First City National Bank* nor *Coit*, therefore, is relevant to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
MARTA W. BERKLEY
Attorneys
Federal Deposit Insurance Corporation

OCTOBER 1995